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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

REPLY BRIEF OF RESPONDENT.

RAYMOND T. JACKSON,
RUSSELL E. LEASURE,
ALEXANDER H. HADDEN,
BAKER, HOSTETLER & PATTERSON,
Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorneys for Respondent.

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REPLY BRIEF OF RESPONDENT.

INTRODUCTORY STATEMENT.

Respondent files this reply brief for the purpose of calling the Court's attention to the numerous infirmities in the contentions made by petitioner for the first time in his reply brief.*

* The following abbreviations will be used in this brief:
Petitioner's Reply Brief—PRB.
Respondent's Brief on the Merits—RB.
Petitioner's Brief on the Merits—PB.
Printed Record—R.

PETITIONER'S THEORY OF THE CASE AND HIS FAILURE TO PROVE NEGLIGENCE.

(PRB, pp. 3, 20-21.)

With the filing of his reply brief petitioner has adopted a theory of his case, and has made admissions which throw into bold relief the fatal inconsistencies of his position. His basic theory, he now says, is that petitioner was required to work in the vicinity of a "cesspool" * containing insects and dead pigeons and rats, and that these conditions "imply an unsanitary, unhealthful condition capable of producing disease." (PRB. 20.) Thus, he claims that "it is not important what species of insect bit the petitioner, or whether such insect would normally be of a class harmful to man." (PRB. 21.) Indeed, he now even admits that the "presence of unidentified insects does not imply danger." (PRB. 20.) Thus, his theory apparently is that the evidence of the property conditions was sufficient proof of negligence, even though the unidentified insects thereon were all harmless to man. The fatal flaws in the theory are demonstrated by the case which petitioner himself pleaded and attempted to prove.

It is true that in the two specifications of negligence submitted to the jury (R. 540), it was alleged simply that petitioner's place of work was unsafe and unsanitary. However, the amended petition then went on to assert that "as the direct and proximate result" of the property conditions, petitioner "was caused to be bitten by an in-

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* Counsel's use of this word is characteristic of their distortion of the evidence; there is not a single word of testimony in this record, including that of petitioner's drainage engineer, to support the claim that this was a "cesspool," i.e. contained fecal material. On the contrary, there is no testimony whatever as to its source, and all concerned throughout the trial assumed that it was runoff and rain water.

sect, causing his illness." Similarly, petitioner's doctors in their answer to the hypothetical question (the sole proof offered on this feature of the case) testified that there was a causal connection between the property conditions, the presence of the biting insect, and the bite sustained by petitioner. Thus, both pleadings and proof explicitly recognized the absolute legal necessity of establishing that a *biting* insect was attracted by, present because of, and came from the pool.

Although petitioner now adopts the inconsistent theory that it was unnecessary for him to prove that the pool would attract harmful insects, he fails utterly to explain how a jury could logically conclude that respondent's premises presented a risk of harm to anyone in the absence of such insects. Certainly the property conditions did not constitute a health hazard in the absence of a *means of transmission* of the unidentified diseases, if any, in the pool. The uncontradicted testimony was that no employee was ever required to walk through the pool, or to come closer to it or remain near it any longer than did petitioner. (R. 308.) In addition, no testimony was given by any witness, lay or medical, with respect to any means of transmission of disease other than a biting insect or some other direct contact with a source of the disease. In the absence of testimony from petitioner's doctors, experts in the highly technical field of disease transmission, as to how and why diseases in the pool might be contracted by those *not* bitten by insects which came from it, the record is entirely devoid of any evidence that the pool was a health hazard to anyone.

But petitioner's assertion that it was unnecessary for him to show that respondent was on notice that its property conditions would attract *harmful* insects totally and

irretrievably destroys his case for an entirely different reason. *For unless it was proved that the biting insect was of a species normally harmful to man and that such insect was attracted by respondent's property conditions, then such insect must necessarily have been on respondent's premises for reasons entirely unconnected with the stagnant pool and dead animals.* In that event, any disease transmitted to petitioner by the insect must *necessarily* have come from a source other than the pool. The presence or absence of the pool could have had no conceivable effect whatever on the presence or absence of the insect, and petitioner would just as likely have been bitten if the pool had not been there.

Petitioner's dilemma could scarcely be more apparent. He contends on the one hand that this proof is unnecessary to his case, and on the other, relies upon his amended petition and his doctors' hypothetical testimony that there *was* a causal connection between the pool, the biting insect, and the bite. Evidently, however, this fatal and obvious inconsistency is a more confortable position for petitioner than would be the admission that the basic scientific facts with regard to insects are directly and categorically contrary to any likelihood of the presence of harmful insects. For if petitioner were now to admit that insects which attack man, a living being, are *not* attracted by or interested in *dead* animals and stagnant water, it would necessarily amount to a confession that the jury had been deliberately misled by the answers to the hypothetical question.

THE FACTS (PRB 4).

Contrary to petitioner's numerous assertions and suggestions (PRB 2, 4 *et seq.*), respondent's factual presentation in its opening brief *is* a full and fair summary of the record in this case, and respondent is content to rest its case on this presentation. A number of arguments made in petitioner's reply brief do, however, require a short rejoinder.

The Sufficiency of Petitioner's Evidence of the Cause of His Disease. At pages 12-14 of his reply brief, petitioner argues that it was unnecessary for him to establish that "pyoderma gangrenosa" has a known medical cause in order for his doctor to state that the disease was caused by the insect bite. In support of this contention, petitioner cites cases in which various diseases allegedly of unknown etiology were held to have been induced by trauma. All of those cases, however, are clearly distinguishable from the facts of the present case.

Thus, *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (PRB 13) did *not* involve the question of the *original cause* of Buerger's disease, but rather whether it could be aggravated by trauma, and there was medical testimony that any appreciable trauma will "frequently" cause such aggravation. (364 U. S. at 326.)

Similarly, in *Braun v. Roux Distributing Co., Inc.*, 312 S. W. 2d 758 (Mo. Sup. Ct., 1958), defendant's drug product contained a "known sensitizer," and the disease was medically associated with sensitization phenomena. Thus, there was proof of direct contact between plaintiff's body and the known source of a known causative agent of the disease.

Petitioner's citations of cancer cases (PRB 14) all necessarily involve a known and notorious medical entity,

its relationship to trauma being a much studied subject. Thus, the Court in *Menarde v. Philadelphia Transportation Co.*, 376 Pa. 497, 103 A. 2d 681 (1954), referred to the fact that there are "certain accepted criteria" on which there is a substantial consensus of medical opinion, which, when met, permit a conclusion of causation by trauma.

In the cases concerning "causalgia" (PRB 14) there is nothing whatever to indicate that the fact, if it be a fact, that the etiology of the disease is medically unknown was ever brought to the courts' attention or considered by them. *Bowers v. Pennsylvania R. Co.*, 182 F. Supp. (1960); *Rice v. Louisville & Nashville R. Co.*, 8 Ill. App. 2d 479, 131 N. E. 2d 808 (1956).

By way of contrast with the foregoing decisions the present case involves a disease so unique as to be entirely without precedent. As Dr. Ippolito said: "Nothing like this man has ever been written up in the medical literature." (R. 228.) A fair appraisal of the medical evidence discloses that petitioner's illness consists of a totally unexplained susceptibility to skin ulcers which have the appearance of those caused by non-infectious diseases, such as diabetes, as well as by infection. (R. 253-5, 205-6, 207-8.) The case is thus much more closely akin on its facts to those decisions in which the causes of systemic disease of unknown origin have been held by the courts not to present jury issues. See, for example, *In Re Sevigny's Case*, 337 Mass. 747, 151 N. E. 2d 258 (1958), in which there was held to be insufficient evidence of a causal connection between staphylococcus infection and leukemia; and *Puhl v. Milwaukee Automobile Insurance Co.*, 8 Wis. 2d 343, 99 N. W. 2d 163, 169 (Wis. 1959), involving the cause of Mongolism. In the latter case, the Court said:

> "While this court has gone a long way in admitting expert testimony deduced from well-recognized scientific and medical principles or discoveries, nevertheless the facts from which the opinion is made must be sufficiently established to have gained general acceptance in the particular medical field in which they belong." (*Id.* 169.)

The Testimony of Dr. Stearns. At pages 14-16 of the reply brief, petitioner attacks the testimony of Dr. Stearns on the ground, apparently, that he was not a physician and thus not qualified to express an opinion as to the connection between the "cesspool" and petitioner's disease. The short answer to this contention is that Dr. Stearns was called not to testify concerning petitioner's illness, but to give evidence concerning the character and habits of the various sorts of insects which would be attracted by the pool, and to testify that no such insects would be likely to attack or bite a human being. Respondent thus freely concedes that Dr. Stearns was not qualified on subjects medical, and suggests that petitioner should also concede that Drs. Ippolito and Anderson were not qualified to testify that the biting insect came from the pool.

ARGUMENT.

A. The Issues Presented to This Court. (PRB 17.)

Petitioner's opening brief was devoted in its entirety to the question of the sufficiency of the evidence of causation to take the case to the jury. In his reply brief, petitioner now for the first time takes the all but incredible position that this is the only federal question involved in this case. (PRB 17-20.) Petitioner is thus apparently asking this Court to hold that in enacting the Federal Employers Liability Act, Congress intended that only the employee's rights were federal rights, and that railroad

employer's rights, if any, are committed to the protection of the states. Merely to state this proposition is to demonstrate its absurdity. Yet it is perhaps a measure of petitioner's desperation that he should attempt in this manner to distract this Court's attention from the jury's findings as contained in the special verdict.

The briefest reference to this Court's prior decisions serves to demonstrate that the mutual rights and duties as between railroads and their employees under the FELA are *in their totality* federal rights, to be uniformly administered in all courts, state and federal. As this Court said in *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1951):

> "Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. *Chesapeake & Ohio R. Co. v. Kuhn*, 284 U. S. 44; *Ricketts v. Pennsylvania R. Co.*, 153 F. 2d 757, 759."

In the *Dice* case, the Court held that the question of the validity of a release was a federal question, a principle later extended in *Maynard v. Durham & Southern Ry. Co.*, 365 U. S. 160 (1961). It has likewise been held that state rules of procedure concerning the construction to be given pleadings must give way in FELA cases, since a "federal right cannot be defeated by the forms of local practice." *Brown v. Western Ry. of Alabama*, 338 U. S. 294, 296 (1949).

Manifestly, therefore, the first three questions set forth in respondent's opening brief (RB 1-2) are federal questions, since each involves an "incident" of the total FELA cause of action. Respondent has been scrupulously careful to relegate to its fourth question all specifications

of error which genuinely involve questions for the state courts of Ohio. Respondent thus submits that the sufficiency of the evidence on negligence and causation, and the sufficiency of the special verdict to support a judgment for petitioner, are all properly before this Court, and this Court has a plain duty to decide all matters relating to these issues.

B. The Proof of Railroad Negligence. (PRB. 20.)

Petitioner's novel theory of the case and his admissions with respect to it have already been discussed at pp. 2 *et seq.* of this brief and require no further comment here. However, petitioner's citation of *Salem v. United States Lines*, 370 U. S. 31 (1962), (PRB 20-1), makes discussion of that case necessary.

Petitioner's reference to the *Salem* case is by way of attempted justification of his argument that expert entomological testimony was unnecessary to permit the jury to reach the allegedly "self-evident conclusion" that respondent's property conditions were "capable of producing disease." (PRB 20-1.) In that case, it was held that the testimony of a naval architect was not necessary to permit the jury to conclude that safety devices should have been installed adjacent to a ladder leading to a crow's-nest from which a seaman fell when he lost his balance. The rule applicable to such cases was stated by this Court to be that expert testimony is not necessary "if all the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation." (370 U. S. at 35.)

But if, as petitioner now contends, no expert testimony was necessary to show either that *biting* insects would be attracted by the stagnant pool or that some means of disease transmission other than an insect was possible, how could the jury rationally conclude either that the insect which bit petitioner was present because of the pool, or that the pool was otherwise a hazard to the health of employees? A vital element of petitioner's theory of liability is that the biting insect was the "transmittal agency" (PB 29) of his disease, *i.e.*, that the disease was introduced into his body *by an insect*, and not by other means. Unlike the *Salem* case, where *no* expert testimony was received from any source, the record in this case contains the unrebutted testimony of respondent's expert entomologist, who testified that no insect of the size described by petitioner would have been attracted to respondent's property, and that the insects which would be so attracted "don't sting and * * * don't bite." (R. 380-1.) Furthermore, it was the uncontradicted medical testimony of Dr. Davis that the stagnant pool and contents would contain *no* micro-organisms not continuously present on all human beings; that large numbers of such organisms do *not* increase the likelihood of transmission of infection to humans; and that all of them have in any event been ruled out as the cause of petitioner's illness. (R. 433-6.) As a result, even if insects *were* attracted by petitioner's property conditions, the uncontradicted evidence is that they would still not have constituted a health hazard to anyone.

This case is thus in the posture that the Court in the *Salem* case foresaw when it suggested that "if there was a reason hidden from the ordinary mind" why safety devices were impracticable, "those facts called upon the defendant to make that reason known." (370 U. S. at 37.) Here, respondent did make known that the facts with regard to

insect life and disease transmission are not what the "ordinary mind" may suppose. The rule of the *Salem* case therefore does not apply.

C. The Special Verdict. (PRB 23.)

In a tortured effort to divert this Court's attention from the jury's special findings on the subject of foreseeability, petitioner at pages 23-4 of his brief asserts that the interpretation of the special verdict gives rise to a question of Ohio procedural law upon which this Court cannot rule. It has already been observed in Section A of the Argument in this brief that FELA cases involve *federal* rights. It is therefore self-evident that the effect to be given a special verdict is a federal question, and this Court has in effect so held in one of the cases cited by petitioner, *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360 (1957), PRB 24. Petitioner's argument does, however, require some further comment.

Under Ohio procedure, the trial court is empowered to submit a case to the jury in the form of a special verdict, with questions being drawn up by the court with respect to "each determinative issue." (Ohio Revised Code § 2315.15.) Such determinative issues, however, must be "issues of fact." (Ohio Revised Code § 2311.04.) Federal procedure is identical. Rule 49(a) of the Federal Rules of Civil Procedure states in part that "The court may require a jury to return only a special verdict in the form of a special written finding *upon each issue of fact.*" (Emphasis supplied.) In the event the Ohio courts were to hold, as contended by petitioner, that only mixed questions of fact and law could be submitted to FELA juries under Ohio practice, then the rights of FELA litigants to have their cases decided pursuant to the unmixed *factual* findings of

a federal special verdict would plainly be circumvented under the name of local practice, a result not tolerable under the decisions of this Court. *Brown v. Western Railway of Alabama*, 338 U. S. 294 (1949). Hence, inasmuch as the questions with respect to foreseeability would clearly be proper under Rule 49(a),* they must plainly be accepted as a valid and subsisting part of the jury's findings.

Petitioner cites and quotes from *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U. S. 355 (1962) and quotes from it (PRB 24) a passage to the effect that where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way, and that it is improper to "search for one possible view of the case" which will make the findings inconsistent. Otherwise, a collision with the Seventh Amendment results. *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360 (1957). But although petitioner pays lip service to these rules, he overlooks their application to the facts of this case, and strives, instead, to have this Court entirely disregard, rather than give effect to, the jury's findings of no foreseeability.

In the light of the instructions given to the jury in this case when the special verdict was submitted, it is plain that there is only one view of the case under which effect can be given to *all* of the jury's findings, reconciling each with the others. In its charge, the Court instructed the jury extensively on the general subject of foreseeability both in writing (R. 518-20) and orally (R. 537, 538 following Question 20), but the single and only definition

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* See, *e.g.*, *Green v. American Tobacco Co.*, 5th Cir., 304 F. 2d 70, in which a negative special finding on foreseeability was made the basis of a judgment for defendant in a diversity negligence case.

of the term "negligence" which was given was the following:

> "Negligence is sometimes said to be a failure to observe for the protection of the rights of others that degree of care, precaution, and vigilance which the circumstances justly demand, and sometimes, in other words, it is said that negligence is the failure to observe ordinary care, and ordinary care is that degree of care which people of ordinary prudence and sagacity use under the same or similar circumstances. What would ordinarily prudent persons have done under like circumstances?" (R. 538.)

Study of the forgoing instruction immediately discloses that nothing was said which informed the jury that a finding of foreseeability (*i.e.*, an affirmative answer to Question 20) was legally necessary to a finding of negligence. Instead, the Court's definition of "negligence" was couched in vague general terms, such as "care," "prudence" and "sagacity."

In the context of these instructions, the jury could well have concluded that the property conditions which it described in answer to Question 17 (stagnant water, dead pigeons, rats, bugs and vermin) might constitute "negligence," since even though no mishap or injury could be foreseen therefrom, "care," "prudence" and "sagacity," the operative adjectives of the definition, might nonetheless seem to justify removal of the stagnant pool and contents in order to give respondent's employees a cleaner, more attractive and pleasanter place in which to work.

Petitioner has not suggested any factual or legal theories, and has cited no authority, under which the findings of no foreseeability can otherwise be harmonized with the supposed finding of "negligence," and the interpretation here suggested is the only one which gives effect to the entire verdict considered as a whole. Thus, unless

this Court is prepared to "search for one possible view of the case which will make the jury's findings inconsistent" (369 U. S. at 364), to search for one possible view which will favor petitioner, and to disregard entirely an indispensable finding favorable to respondent, the final judgment for respondent must be affirmed.

D. Remand to the Ohio Supreme Court. (PRB 26.)

Respondent has some difficulty in reconciling the bold face caption on page 26 of petitioner's reply brief with the argument which follows. If "there is no reason contrary" to a remand, as stated in the caption, then presumably petitioner would not oppose one. If, however, as the argument seems to suggest, respondent has exhausted its remedies, then a remand would not be appropriate. If the latter is petitioner's true contention, then it suffices to say that whether or not the Ohio Supreme Court now has the power to hear the case on respondent's cross motion to certify (R. 636) is plainly a question of Ohio law which the Ohio Supreme Court alone should determine. Thus, in either event, a remand will be appropriate should the Court resolve all other questions in petitioner's favor.

CONCLUSION.

If, as petitioner now apparently concedes, the insects attracted by respondent's property conditions were all of a type harmless to man, then petitioner's case must fail, either because the biting insect must in that case have been present for reasons unconnected with the stagnant pool, or because there would then be no evidence whatever of any means of transmission of disease from the pool to humans. If, on the contrary, petitioner's theory is that respondent's property conditions placed it upon notice that *harmful* insects would be attracted, then petitioner must fail because of his admitted and unexplained failure to introduce competent proof from a qualified entomologist to overcome the unrebutted testimony to the contrary of Dr. Stearns. In either case, it is plain that the final judgment for respondent must be affirmed.

Respectfully submitted,

RAYMOND T. JACKSON,
RUSSELL E. LEASURE,
ALEXANDER H. HADDEN,
Attorneys for Respondent.

November 28, 1962.